5. Homicide (§ 1169 (5)*)—Permitting Evidence, under Limitations, of Recent Ship Robberies, Not Error.—In a murder prosecution, where evidence as to recent previous robberies of ships by defendants acting together was admitted, but the court instructed that the jury could only consider this evidence in connection with and as explanatory of the intent and plan of defendants at the time the crime charged was committed, and that they could not consider it as proof that defendants had committed other offenses not charged in the indictment, and defendants' rights further guarded by other instructions, there was no reversible error in the admission of this evidence.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 592.]

6. Criminal Law (§ 636 (3)*)—Motion for Continuance for Sickness of Accused Not Part of Trial Requiring Presence of Accused at Its Determination.—Where in a murder prosecution one of the defendants on April 20 during the trial was taken ill in jail, and the trial suspended from time to time because of his absence until April 22, when he was brought into court and the trial proceeded, in view of Code 1919, § 4894, providing that a person tried for felony shall be personally present, but also that a motion for continuance, whether made before or after arraignment, shall not be deemed part of the trial, the suspensions from time to time were not part of the trial nor denial of defendant's guilt.

[Ed. Note.—For other cases, see 3 Va-W. Va. Enc. Dig. 300.]

7. Criminal Law (§ 97 (5)*)—Corporation Court Had Jurisdiction of Homicide within One Mile of City Limits.—Where a homicide was committed on board a ship anchored within 500 or 600 yards of a pier, being within one mile of the city limits, the corporation court, by Code 1919, § 5910, providing that corporation courts have concurrent jurisdiction with circuit courts over offenses, etc., had jurisdiction.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 899.]

Error to Corporation Court of Norfolk.

W. E. Seymour and others were convicted of murder, and they bring error. Affirmed.

J. L. Broudy and *Tazewell Taylor,* both of Norfolk, for plaintiffs in error.

John R. Saunders, Atty. Gen., for the Commonwealth.

PAYNE, Director General of Railroads *v.* BROWN.

June 15, 1922.

[112 S. E. 833.]

1. Appeal and Error (§ 995*)—Evidence Rejected by Jury Cannot Be Considered on Appeal unless Material as to the Instructions.—Evi-

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*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

dence on behalf of defendant, which was evidently rejected by the jury in rendering a verdict for plaintiff, cannot be considered by the reviewing court except in so far as it may be material to questions of law arising upon the instructions.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 592.]

2. Railroads (§ 324 (1)*)—Care Required of Driver Approaching Crossing Depends on Circumstances.—The ordinary care which it is the duty of a motortruck to observe in approaching a railroad crossing depends upon the circumstances of the case, and must be commensurate with the danger.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 136.]

3. Negligence (§ 136 (26)*)—Contributory Negligence Question for Jury.—What is ordinary care on the part of one injured is a question for the jury if the facts are such that fair-minded men might reasonably differ thereon.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 354.]

4. Railroads (§ 350 (22)*)—Contributory Negligence of Truck Driver Failing to Stop Held for Jury.—It is not contributory negligence as a matter of law for the driver of a motortruck who slowed down, drove cautiously, and continued to look and listen in approaching a track, not to stop, though his view of an approaching train was in fact obstructed by coal cars on an adjoining track, where he could reasonably expect to have seen evidences of the train's approach over the tops of the cars, and this is so even though he had a boy on the truck with him whom he could have sent ahead to signal.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 135.]

5. Trial (§ 253 (9)*)—Instruction Requiring Truck Driver to Stop if He Could Not See Held Erroneous.—A requested instruction that, if a truck driver's view was obstructed by cars on an intervening track to such an extent he could not see the approaching train without stopping, it was his duty to stop in a place of safety and use reasonable care to ascertain if a moving train was upon the track, was erroneous as disregarding plaintiff's reasonable belief he could have seen the train notwithstanding the obstruction, and his caution in running slowly, listening for a train, and depending upon signals which it was defendant's duty to give.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 140.]

6. Pleading (§ 427*)—Failure to Object to Evidence Held Not to Waive Requirement Contributory Negligence Must Be Pleaded.—Plaintiff did not waive the provisions of Code 1919, § 6092, requiring contributory negligence to be affirmatively pleaded by defendant if he intends to rely thereon, by failing to object on that ground to evidence on behalf of defendant that part of the train projected enough above the intervening obstruction to have been seen by plaintiff, and

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*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

that the engine was emitting smoke and making noise to such an extent that plaintiff could have seen and heard it, since such evidence was admissible not only to show plaintiff's contributory negligence, but also in rebuttal of the negligence charged by the declaration in obstructing the view of the track by the coal cars, and in operating its train without warning.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 135.]

7. Negligence (§ 119 (6)*)—Instruction Excluding Defendant's Evidence of Contributory Negligence Not Pleaded Held Correct.—Where defendant failed to comply with the requirements of Code 1919, § 6092, with reference to pleading contributory negligence, and there was no waiver of the statute, the defense was limited to plaintiff's failure to show the injury was proximately caused by defendant's negligence, or to the contributory negligence of plaintiff as disclosed by his own testimony; and, where those defenses were fully and fairly submitted to the jury, it was not error to give an instruction to disregard all of defendant's evidence bearing on contributory negligence.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 135.]

8. Negligence (§ 119 (6)*)—Contributory Negligence Not Pleaded Cannot Be Proved by Defense without Amendment.—A defendant cannot avoid the effect of Code 1919, § 6092, requiring him to plead contributory negligence, by claiming the facts with reference thereto were unknown to him before he heard plaintiff's testimony at the trial, and thereby obtain the right to introduce evidence as to such negligence in violation of the provisions of the statute, but his remedy in such a case would be either by application for a continuance, or by application under section 6104 to amend his answer to meet the situation disclosed, which could be granted either with or without a continuance.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 406.]

Error to Circuit Court, Greensville County.

Action by C. M. Brown against John Barton Payne, Director General of Railroads, operating the Virginian Railroad. Judgment for plaintiff, and defendant brings error. Affirmed.

Walter C. Plunkett, of Roanoke, and *Williams, Loyall & Tunstall,* of Norfolk, for plaintiff in error.

Jno. N. Sebrell, Jr., of Norfolk, and *E. Peyton Turner,* of Emporia, for defendant in error.

PERKINS *v.* DIRECTOR GENERAL OF RAILROADS.

June 15, 1922.

[112 S. E. 839.]

1. Appeal and Error (§ 1002*)—Conflicts in Evidence are Settled

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.